6-1-1976

O.H. Snyder and Helen C. Snyder, his wife, d/b/a Owensboro Homes, a partnership v. Daviess County, Kentucky, a political subdivision of the Commonwealth of Kentucky Pat Tanner, Daviess County Judge; William Froehlich, John W. Oldham and James L. Riney, Daviess County Commissioners, Comprising the Fiscal Court of Daviess County, Kentucky; and Owensboro Metropolitan Planning Commission, consisting of Dr. Albert Joslin, Robert Hoskins, Holloway Hawes. Wilbur "Buzz" Norris, Jolly Hayden, Lee K. Nelson, Billy Joe Miles, Robert Riggs, Willis P. Brooks, and

Jarred Barron, in their Official Capacity as Members Thereof

Brief 1976-SC-0430

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BRIEF

SUPREME COURT OF KENTUCKY

File No. 76-430 and 76-431
(Consolidated for Briefing)

O. H. SNYDER and HELEN C. SNYDER, His Wife, d/b/a Owensboro Homes, a Partnership - Cross-Appellants

versus

DAVIESS COUNTY, KENTUCKY, a Political Subdivision of the Commonwealth of Kentucky;

PAT TANNER, Daviess County Judge;

WILLIAM FROEHLICH, JOHN W. OLDHAM and JAMES L. RINEY, Daviess County Commissioners, Comprising the FISCAL COURT OF DAVIESS COUNTY, KENTUCKY; and

OWENSBORO METROPOLITAN PLANNING COMMISSION, Consisting of Dr. Albert Joslin, Robert Hoskins, Holloway Hawes, Wilbur "Buzz" Norris, Jolly Hayden, Lee K. Nelson, Billy Joe Miles, Robert Riggs, Willis P. Brooks, and Jarred Barron, in Their Official Capacity as Members Thereof - - - - - - - - Cross-Appellees

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CROSS-APPEAL FROM DAVIESS CIRCUIT COURT
DIVISION II
HONORABLE ROBERT M. SHORT, PRESIDING

CONSOLIDATED BRIEF FOR CROSS-APPELLANTS

RONALD M. SULLIVAN
SANDIDGE, HOLBROOK & CRAIG, P.S.C.
100 St. Ann Building
Owensboro, Kentucky 42301
Attorneys for Cross-Appellants

This is to certify that copies of the within brief were served by First Class Mail upon opposing counsel, Hon. Charles J. Kamuf, Hon. Philip B. Hayden and the Trial Judge, Hon. Robert M. Short, as required by R.A.P. 1.250, this 24th day of May, 1976.

Ronald M. Sullivan
Attorney for Cross-Appellants

WESTERFIELD-BONTE CO., 619 W. KENTUCKY—P.O. BOX 3251, LOUISVILLE, KY.

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I

STATEMENT OF THE CASE

This is a cross-appeal from a judgment of Daviess Circuit Court (T.R.[1] 422-437). The plaintiffs and

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[1]Transcript of Record.

cross-appellants are O. H. Snyder and Helen C. Snyder, his wife, d/b/a Owensboro Homes, a partnership, hereinafter called "Snyder". The defendants and cross-appellees are Daviess County, Kentucky, and the members of the Fiscal Court of Daviess County, Kentucky, hereinafter sometimes referred to as "Daviess County"; and Owensboro Metropolitan Planning Commission and the members thereof, hereinafter called "OMPC".

This case deals with Snyder's attempt to rezone a 21.19 acre tract of land from A-1, Agricultural classification, to R-3, Residential classification. In 1973 Snyder acquired a 21.19 acre tract of land located on Veach Road in Daviess County, Kentucky, and lying immediately adjacent to the existing Forest Hills Subdivision which had previously been developed by Snyder and which made available all necessary utilities to serve residential development. Snyder's plan was to subdivide the 21.19 acre tract calling it Forest Park Subdivision. The record contains a plat of Snyder's property as Exhibit H among the contents of Envelope II.[2]

In accordance with the practice of OMPC, in November, 1973 Snyder made application for necessary rezoning of the tract and simultaneously for approval of a preliminary subdivision plat (Env. II, Exs. A, B and G). Different applications for rezoning were also filed in January of 1974, February of 1975 and March of 1975 (Env. II, Exs. C, D, E & F and Folder #26). From the beginning Snyder requested that cer-

[2]Any of the seven envelopes of exhibits filed with the record will be referred to as "Env." as numbered by the clerk.

tain parts of the tract be rezoned R-3 for multi-family or duplex development. Finally, in the March, 1975 application he requested that the entire tract be rezoned R-3 in order to comply with a zoning requirement that such a tract be of a single classification (T.R. 72-73 §3.04 and Env. II, Ex. F, pp. 12-16). The OMPC voted on each occasion for various and sundry reasons to refuse to recommend to the Daviess Fiscal Court any R-3 rezoning for the tract.

On June 9, 1975 Snyder's R-3 zoning request was heard by the Daviess Fiscal Court, and a complete transcript of the proceedings was made (Env. I, Ex. A[3]). The Fiscal Court followed the recommendation of the OMPC, and for numerous stated reasons (T.H. 113 & 114) denied the rezoning as the warranted course of action for the public health, safety and welfare.

The entire matter was appealed to the Daviess Circuit Court for a review of the proceedings of the OMPC and the Fiscal Court, and the Circuit Court entered its judgment on January 15, 1976 (T.R. 422-437) finding that the action of the Fiscal Court in denying the rezoning was arbitrary and directing the Fiscal Court to rezone the property R-3 since the property is unquestionably "residential"[4] property, and the R-3 classification is the only reasonable classification available for this property under the Daviess County Interim Zoning Order (T.R. 59-106).

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[3]Hereinafter referred to as T.H.

[4]Daviess County concedes that the land is suitable for residential development at page 12 of "Separate Brief for Appellant" filed on May 21, 1976 in Appeal No. 76-402.

The only evidence presented to the Fiscal Court or the OMPC on the issue of the reasonableness of the existing and available zoning classifications for residential development of the property was feasibility studies made by O. H. Snyder, one of the cross-appellants, and his testimony. For 36 years Snyder has been in the real estate business and is a qualified expert in real estate valuation and appraisal (T.H. 18). It is uncontroverted that it was not economically feasible to develop the tract for residential purposes under either the A-1, R-1 or R-2 classifications, which were the only zoning classifications available for residential development in Daviess County other than the R-3 classification. Only single family development was authorized in A-1, R-1 or R-2 (T.R. 84-86 & 96).

OMPC and Daviess County have appealed to the Supreme Court of Kentucky apparently to seek a reversal of that part of the judgment of the Daviess Circuit Court which ordered the property rezoned to R-3.

In this cross-appeal Snyder raises two points. He claims that it was erroneous for the Daviess Circuit Judge to dismiss Count I of the complaint (T.R. 1-11a). In Count I he alleged inverse condemnation on the theory that the refusal of Daviess County to rezone the property to R-3 constituted a taking of Snyder's property for public purposes without just compensation as prohibited by §13 of the Kentucky Constitution and the 5th Amendment to the United States Constitution.

Secondly, Snyder claims that part of the Court's Judgment which dismissed Count IX of Snyder's

amended complaint (T.R. 31) is erroneous. Count IX alleged that the Interim Zoning Order of Daviess County was void for failure to comply with the comprehensive plan requirements of KRS Chapter 100.

In addition to his zoning problem which is the subject matter of this appeal, Snyder also litigated through the Circuit Court and the Kentucky Court of Appeals the preliminary subdivision plat approval which was denied by the OMPC on February 9, 1974. That litigation resulted in *Snyder* v. *Owensboro,* Ky., 528 S. W. 2d 663 (1975), in which the Daviess Circuit Court was reversed and the OMPC ordered to approve Snyder's preliminary plat of the land in question for Forest Park Subdivision (Env. II, Ex. H).

Owensboro and parts of Daviess County have had zoning since 1947 (T.R. 235). Before the OMPC was created in 1970 (T.R. 264), the Owensboro Planning & Zoning Commission was authorized under the 1947 ordinance to control zoning in Owensboro and in Daviess County to the extent of three miles outside the city limits. Snyder's tract has always been within the three mile area, but prior to the time of the adoption of the Interim Zoning Order by Daviess County on September 17, 1971 (T.R. 59-106) the tract had been unzoned, as were most other undeveloped areas within the three mile jurisdiction. There was no agricultural zone under the old ordinance (T.R. 235-236). The 1971 Zoning Order (T.R. 98, §4.14) zoned *all* unzoned areas of Daviess County, including Snyder's tract, A-1, Agricultural. In this classification residential develop-

ment was limited to single family dwellings on a minimum of one acre lots (T.R. 96).

OMPC has claimed and operated as though the "comprehensive plan" for the entire Daviess County as required by KRS Chapter 100 is the Michael Baker Master Plan which was adopted by the old Owensboro Planning & Zoning Commission on February 10, 1966 (T.R. 263 & 362 and Env. III). The Michael Baker Plan designated the area of the Snyder tract as low density residential (T.R. 236). There was really no one who contested Snyder's assertion that his land was suited for residential development (T.H. 27-29). The question was not whether it was suited for residential development but was what lot sizes would be authorized and whether multi-family dwellings would be permitted.

The feasibility studies which were uncontroverted in the record[5] show that the only economically feasible classification for development of the tract for residential purposes is R-3. As of February 9, 1974, the date of an earlier application for rezoning, 84 dwelling units were necessary to make the development economically feasible, but by February 9, 1975 the number of units necessary to make the development feasible had increased due to economic conditions to 113 (T.H. 45).

According to the uncontroverted studies and the testimony of Snyder (T.H. 18-50), the A-1, R-1 and R-2 classifications would cost some $100,000 to $340,000

[5]There are two feasibility studies in the record. The first consisting of 29 pages and Ex. Z is found in Env. II, Folder #26. The second covering the A-1 classification only is found in Env. I as Ex. 1 to Ex. A.

more to subdivide and develop than the lots of the subdivision would bring on the market. Therefore, none of the classifications except R-3 was economically feasible, and they were all so unreasonably restrictive that to classify the property A-1, R-1 or R-2 would constitute a zoning for no reasonable use.

Inverse Condemnation

The Circuit Court dismissed Snyder's claim for damages for inverse condemnation before deciding the other issues in the case (T.R. 249), and the Court reaffirmed that order in the final judgment (T.R. 436). Snyder alleged in Count I of his complaint (T.R. 1) that the refusal of Daviess County to rezone the tract from A-1 to R-3 as requested was unreasonable, a zoning for no reasonable use, and left the property in a classification which was not economically feasible for residential development. He further alleged that such action of the Fiscal Court was a taking of his property for public use without just compensation in violation of §13 of the Kentucky Constitution and the 5th Amendment of the United States Constitution.

In essence, the Court held that if Snyder was entitled to any relief, it was to be a declaration that the act of the Fiscal Court, which had the effect of depriving him of development rights without just compensation, was void or unconstitutional as applied to Snyder, and the Court would allow Snyder to develop his property. The Court's holding was that under no circumstance could a denial of a rezoning request entitle a property owner to bring a civil action for inverse con-

demnation and recover damages therefor. This is the holding upon which Snyder cross-appeals claiming that after the Fiscal Court's act denying rezoning for unconstitutional reasons, it was Snyder's option to pursue an action for reverse condemnation or to seek relief in the form of mandamus as the Court ultimately granted in this case.

Comprehensive Plan

The second issue raised on this cross-appeal deals with the OMPC's compliance with KRS Chapter 100. The lower court held:

> ". . . the Court finds as a matter of law that the Interim Zoning Order of Daviess County is valid for the reason that the defendants are in good faith proceeding toward the accomplishment of the planning requirements of KRS Chapter 100 and Count IX of plaintiff's complaint is dismissed" (T.R. 436).

Snyder claimed that under KRS 100.207 the entire Daviess County Zoning Order was invalid for failure to comply with planning requirements, a shortcoming with which this Court is familiar. See *City of Erlanger* v. *Hoff*, Ky., 535 S. W. 2d 86 (1976).

The evidence on this issue consists of the two depositions of the planning director, Roger Anderson, taken on September 30 and November 12, 1975 (T.R. 202-244 and 256-361). The OMPC claims that it has a "comprehensive plan" in the Michael Baker Master Plan (Env. III, Item 1) adopted in 1966 by the Owensboro Planning & Zoning Commission (Env. III, Item

2). They claim it was also adopted by the OMPC on September 12, 1970 T.R. 213-215 and Env. III, Item 3) by the following resolution:

> "'. . . the Commission unanimously agreed to adopt the current planning regulations that have been in effect, pending the formulation of new plans.'"

But the Michael Baker plan fails to cover all of Daviess County and does not cover Whitesville. It is limited to a radius of some five miles from downtown Owensboro (T.R. 210-214), and it cannot stand as a comprehensive plan for Daviess County when it does not cover the whole area. If it is the plan for Daviess County, the county's Interim Zoning Order is invalid under *City of Erlanger, supra,* in zoning Snyder's land Agricultural which does not agree with the plan.

In defense of Snyder's claim that the zoning order was void for failure to comply with the comprehensive planning requirements of KRS Chapter 100, the second deposition of Roger Anderson was taken in which he mentioned several studies which were adopted by the OMPC after it had concluded its deliberations and action on Snyder's rezoning application in May, 1975. In Anderson's deposition he also refers to numerous mapping programs and miscellaneous studies which he claimed were of value in the preparation of a comprehensive plan, but he was not able to point to the existence before May, 1975 of the elements required for a comprehensive plan by KRS 100.187.

The matter of the absence of a comprehensive plan will be taken up first in the Argument.

II

ARGUMENT

(A) The Interim Zoning Order of Daviess County Is Void for Failure to Comply With the Requirements of KRS Chapter 100 for a "Comprehensive Plan".

Kentucky's zoning law, KRS Chapter 100, was substantially rewritten in 1966. The new statute imposed many new requirements upon the various local bodies charged with adopting, administering and enforcing the zoning laws.

KRS 100.183 requires the planning commission to prepare a comprehensive plan which shall serve as a guide to the public and private sector, and KRS 100.187 sets out the several specific elements of a comprehensive plan:

(1) a statement of goals and objectives,
(2) a land use plan element,
(3) a transportation plan element,
(4) a community facilities plan element, and
(5) such others as the planners may require.

Another mandatory requirement is contained in KRS 100.193 which requires that a statement of goals and objectives shall be adopted by the planning commission *and* the legislative bodies involved. Claiming to have complied with this section, Anderson referred to Article I of the Bylaws of the OMPC (T.R. 225-226, Env. III, Item 4). Even if these Bylaws did contain material which would comply with the statutory requirement, they were never adopted by the "legislative

bodies and fiscal courts in the planning unit" as required by KRS 100.193.

KRS 100.197 provides that the statement of objectives must be adopted first. Then, after a public hearing, the other elements are to be adopted. Although the OMPC claims the Michael Baker Plan is their "comprehensive plan", no public hearing was ever had by the OMPC relative to the Michael Baker Plan as required by KRS 100.197. The OMPC, newly created in 1970 with county-wide jurisdiction, never held a public hearing on the plan and never even mentioned it by name in the resolution by which Anderson claims it was adopted (T.R. 214). In *Hines* v. *Pinchback—Halloran Volkswagen, Inc.*, Ky., 513 S. W. 2d 492 (1974) the Court said:

> "A comprehensive plan cannot be adopted by the Planning Commission without compliance with the research requirements of KRS 100.191 and the holding of a public hearing as required by KRS 100.197. The procedure for amendment of the comprehensive plan is the same as for the adoption of the original plan. KRS 100.197."

The OMPC totally ignored the requirements of these statutes, or, we submit, realized that the Michael Baker Plan could not qualify as the comprehensive plan for the planning area, Daviess County, and never intended it to be so considered until the issue was forced by these proceedings. The Preamble to the County Interim Zoning Order adopted September 17, 1971 acknowledges that no comprehensive plan had been adopted by the OMPC in the following words:

> "WHEREAS, it will require time for the Planning Commission, pursuant to the authority and according to duties set out in the Kentucky Revised Statutes, to make surveys, investigations, studies and hold public hearings for the publication and adoption of a comprehensive plan and a permanent zoning ordinance; and,
>
> "WHEREAS, during the time such plans are being prepared it would be detrimental to a comprehensive zoning order to permit further intrusion of incompatible mixtures of land use in Daviess County" (T.R. 60).

The above-quoted resolution of Daviess Fiscal Court was passed more than a year after the September 12, 1970 resolution of the OMPC to which Anderson referred as the adoption of the Michael Baker Plan as a comprehensive plan (T.R. 214) and constitutes an admission by Daviess County of the validity of Snyder's position that there is no "comprehensive plan" for Daviess County.

KRS 100.201 allows the city and county to zone land after the objectives *of* (sic) the land use element have been adopted, but KRS 100.207 requires the adoption of both the objectives *and* the land use plan element before zoning requlations may be adopted. We submit that the statutes require that both of these elements of the comprehensive plan are mandatory prerequisites to a zoning ordinance and there was not a properly adopted land use element in Daviess County.

If the zoning ordinance of Daviess County is valid, it must be because of KRS 100.334 which provides that:

> "If the planning commission is conducting or, in good faith is preparing to conduct, studies which are required for a comprehensive plan, the commission and the legislative bodies may prepare and adopt interim regulations before the otherwise required plan elements are completed."

These statutes were effective in 1966, and KRS 100.367 gave municipalities five years until June 16, 1971 to be brought into conformity with the law. This five year standard of reasonableness in complying with the statute also appears in KRS 100.197 requiring that all elements of a comprehensive plan be reviewed and amended every five years. When the OMPC ruled on Snyder's zoning request, nine years had passed since the statute was enacted and the OMPC and Daviess County were still operating without a "comprehensive plan" and under an *Interim* Zoning Order. Surely, the OMPC and Daviess County cannot operate under an Interim Zoning Order forever and be found to be "in good faith" about adopting a "comprehensive plan" for Daviess County.

The zoning of all unzoned land in Daviess County A-1, and the passage of nine years since the legislation and four years since the adoption of the Interim Zoning Order falls far short of establishing good faith. Instead of doing the necessary planning as required by law and as encouraged by our Court of Appeals, the OMPC like so many planning commissions in this Commonwealth has concerned itself with zoning—zoning—zoning, and has, in fact, engaged in piecemeal planning in an inappropriate manner and only when forced upon them by a rezoning request.

The importance of planning is well expressed by the Court in *Smith* v. *Skagit County,* Wash., 453 P. 2d 832 (1969), where the Court stated that preparation of a comprehensive plan is the beginning and the indispensable precursor of county zoning laws, both in the scheme of zoning and under enabling legislation. It requires public hearings, and it is neither casual nor perfunctory, but instead it must contain specific elements which will serve as a guide to later development and zoning codes.

Two Nebraska cases, *Deans* v. *West,* Neb., 203 N. W. 2d 504 (1973), and *Bagley* v. *County of Sarpy,* Neb., 202 N. W. 2d 841 (1972) have held that a lapse of 3½ and 4 years respectively between the adoption of the zoning ordinance and the adoption of a comprehensive plan was an unreasonable delay and the zoning ordinance was held invalid in one case and enforcement of same enjoined in the latter.

The OMPC attempts to overcome this objection by referring to the Michael Baker Plan which related to some 1/5 of the planning area, but nine years is too long to delay, is unreasonable, and shows a lack of the good faith required when 80% of this county remains with no comprehensive plan, no planning, for the guidance of developers, the OMPC or the Fiscal Court. By the deposition of Anderson of November 12, 1975 the OMPC tries to show its "good faith", but we submit that all the deposition shows is the expenditure of federal monies in the duplication of mapping programs, most of which are already available in the city or county, and the undertaking of a few specific

research projects with more federal funds, all in furtherance of "Parkinson's law".

A review of the record before the OMPC and the Daviess Fiscal Court shows the confusion, the misery and the injustice existing in Daviess County because of the lack of a comprehensive plan. For years piecemeal rezoning in this county has plagued the OMPC and the citizens of Daviess County with a monthly serial performance of the Roman arena show involving the Christians and the lions.

Several Kentucky cases have noted the importance of planning. In *Fritts* v. *City of Ashland,* Ky., 348 S. W. 2d 712 (1961), the Court said:

> ". . . It is to be hoped that in the future zoning authorities will give recognition to the fact that an essential feature of zoning is *planning.*"

Considering the matter again, in *City of Louisville* v. *McDonald,* Ky., 470 S. W. 2d 173 (1971), the Court said:

> "That statement made in 1961 has had little discernible effect."

There the Court went on to criticize the absence of planning by zoning authorities stating that instead of proper planning, they wait until a zoning request comes along and then decide whether or not to grant the request in an exercise of the forbidden practice of spot zoning.

Referring to Kentucky's zoning laws, the Court said in *Hines* v. *Pinchback-Halloran Volkswagen, Inc., supra:*

> "Its obvious purpose was to require zoning to conform to the basic scheme of prior planning . . . and to prohibit indiscriminate ad hoc zoning changes which do not conform to the original comprehensive plan."

After commenting on the importance of planning as a necessary prerequisite of good zoning, the Supreme Court in *City of Erlanger* v. *Hoff, supra,* held that the reenactment of the existing zoning ordinance of Erlanger did not constitute valid "interim regulations" as authorized by KRS 100.334 when a planning commission is in good faith working toward a comprehensive plan "since that section is concerned with interim regulations of the planning commission in formulating a comprehensive plan."

Since the Daviess County Interim Zoning Order in no way constitutes "interim regulations of the planning commission in formulating a comprehensive plan" as stated in *City of Erlanger* v. *Hoff, supra,* there is no legal authority for their adoption until the OMPC has adopted a comprehensive plan for all of the planning area (Daviess County) as required in KRS 100.183.

We submit that the Supreme Court should reverse the Judgment of the Daviess Circuit Court on this point and declare the interim Daviess County Zoning Order invalid for failure to comply with the comprehensive planning requirements of KRS Chapter 100.

(B) When a Fiscal Court Denies a Property Owner Rezoning From a Classification in Which He Can Make No Reasonable Use of His Land, the Property Owner Has a Cause of Action for Inverse Condemnation.

The United States and Kentucky Constitutions prohibit taking property without compensation. §13 of the Kentucky Constitution reads:

> ". . . nor shall any man's property be taken or applied to public use without the consent of his representative, and without just compensation being previously made to him."

The 5th Amendment to the United States Constitution contains a similar restriction on government power over private property.

The position of the Supreme Court of the United States on the question of when regulation of the use of property becomes a taking culminated in *Pennsylvania Coal Co.* v. *Mahon,* 260 U. S. 393 (1922) a case which arose when the Pennsylvania legislature made it unlawful to mine coal so as to cause subsidence to any dwelling, public building or road. The coal company claimed that the law, if valid, constituted a taking of property without just compensation. Pointing out that the police power is a limitation upon the use of private property, Justice Oliver Wendell Holmes in his opinion said:

> "The general rule, at least, is that while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking . . . We are in danger of forgetting that a strong public

> desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for the change. As we already have said, this is a question of degree—and therefore cannot be disposed of by general propositions."
>
> * * *
>
> ". . . What makes the right to mine coal valuable is that it can be exercised with profit. To make it commercially impracticable to mine certain coal has very nearly the same effect for constitutional purposes as appropriating or destroying it. This we think that we are warranted in assuming that the statute does."

Subsequently, in *Village of Euclid* v. *Ambler Realty Co.,* 27 U. S. 365 (1926), the Supreme Court upheld a zoning ordinance in the face of a charge that it affected the market value of the property without just compensation. But consistent with its holding in *Pennsylvania Coal,* the Court pledged:

> ". . . When, if ever, the provisions set forth in the ordinance in tedious and minute detail come to be concretely applied to particular premises . . . some of them or even many of them may be found to be clearly arbitrary and unreasonable . . ."

Two years later Justice Sutherland redeemed this pledge in *Nectow* v. *City of Cambridge,* 277 U. S. 183 (1928), by striking down a Massachusetts zoning ordinance (much like the one in *Euclid*) as it applied to the plaintiffs' property because no practical use could be made of part of the plaintiffs' land.

Zoning laws are not sacrosanct, but must meet constitutional requirements. A more recent Supreme Court decision reiterating the rule that it is a matter of degree is *U. S.* v. *Central Eureka Mining Co.*, 357 U. S. 155 (1958).

Kentucky has frequently recognized that when zoning deprives a property owner of the reasonable use of his property, it constitutes a taking. In *Standard Oil Co.* v. *City of Bowling Green*, Ky., 50 S. W. 2d 960 (1932), an ordinance outlawing an existing gas station was held invalid. The Court stated that the power to zone is not unlimited and may not be exercised unreasonably or arbitrarily. Citing *Pennsylvania Coal Co.* v. *Mahon, supra,* with approval, the Kentucky Court said:

> ". . . if regulation goes too far it will be recognized as a taking for which compensation must be paid."

See also *Parkrite Auto Park, Inc.* v. *Shea,* Ky., 235 S. W. 2d 986 (1950), where the Court in discussing a municipality's right to prohibit a legitimate business because it might cause some public inconvenience, said:

> ". . . However, courts must be most careful in condemning a business on this ground because to do so is taking a man's property without compensation."

In *Hager* v. *Louisville & Jefferson County P & Z Comm'n,* Ky., 261 S. W. 2d 619 (1953), the Court held that the planning and zoning authority may not, under the guise of amending its master plan, transfer rights in private property to the city and county, which rights

the latter may only acquire by eminent domain. To do so amounts to an attempted taking of property without due process and results in an appropriation of private property for public use without just compensation in violation of the Constitution. The Kentucky Court cited as authority for its holding *Yara Eng Corp.* v. *City of Newark,* N.J., 40 A. 2d 559 (1945), which declared unconstitutional an ordinance which restricted building heights near an airport without compensation.

A Kentucky case directly in point with the instant situation to the extent of recognizing that a property owner may not be deprived of reasonable use of his property is *Taylor* v. *Coblin,* Ky., 461 S. W. 2d 78 (1970), a case arising in Franklin County. The plaintiff sought rezoning from residential to commercial. His property ran from East Main Street back several hundred feet. The front part of his property was zoned commercial, but the back part was zoned residential. He introduced expert testimony that it was not economically feasible to develop the rear part of his property under the residential classification since it would cost more to develop the lots than they would bring on the market. This rendered the part zoned residential practically worthless as such. The rezoning was denied in the face of "emotional, unfounded and frivolous" objections, very similar to those made in the instant case to Forest Park Subdivision. The Court of Appeals held that under the circumstances the failure to rezone was arbitrary, and the Fiscal Court was put under a mandate to rezone the property, but no one raised the question of whether the property owner had a remedy in inverse condemnation.

Our courts also recognized the theory that zoning may be confiscatory and unlawful in *Schloemer* v. *Louisville,* Ky., 182 S. W. 2d 782 (1944).

The Kentucky Legislature, recognizing the need to limit the power of government to restrict the use of private property, enacted KRS 100.307. It limits the power to designate an area as a public place and prohibits building thereon if the property will not yield a "fair return" to its owner. Under those circumstances the Board of Adjustment is given the power to grant a permit to the owner to build within the public area shown on the plan in question. The statute recognizes the point of economical feasibility as the breaking point in the exercise of police powers. When planning and zoning restrictions make the use of property not economical, it becomes a zoning for no use for which an exception must be made or damages paid for the taking.

There are many cases from other states where the principle is recognized that when the exercise of the police power and the zoning power go so far as to become a taking of property, it is unconstitutional.[6] The authorities on zoning also recognize the unconstitutionality of confiscatory zoning.[7]

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[6]*Morris County* v. *Twp. of Parsippany-Troy Hills,* N.J., 193 A. 2d 232 (1963); *Commissioner of Natural Resources* v. *S. Volpe Co.,* Mass., 206 N. E. 2d 666 (1965); *Beaver* v. *Village of Bolingbrook,* Ill., 298 N. E. 2d 761 (1973); *American National Bank* v. *Winfield,* Ill., 274 N. E. 2d 144 (1971); *Westwood Forest Est., Inc.* v. *Village of S. Nyack,* N.Y., 244 N. E. 2d 700 (1969); *McConnell* v. *Incorporated Village of Tuckahoe,* N.Y., 266 N.Y.S. 2d 821 (1966); *Corthouts* v. *Town of Newington,* Conn., 99 A. 2d 112 (1953); *Spann* v. *Dallas,* Tex., 235 S. W. 513 (1921); *Arverne Bay Const. Co.* v. *Thatcher,* 278 N. Y. 222, 15 N. E. 2d 587 (1938); *Vernon Park Realty* v. *City of Mt. Vernon,* N.Y., 121 N. E. 2d 517 (1954); and *City of Evansville* v. *Reis Tire Sales, Inc.,* Ind., 333 N. E. 2d 800 (1975).

[7]58 Am. Jur., Zoning §19, and Zoning §§140 & 141; *Land Regulation and Comprehensive Planning* by Marcus Groves, p. 59, *et seq., The New Zoning,* by Marcus Groves, pp. 72 & 85; and *The Law of Planning and Zoning,* by Rathkopf, p. 6-6 and Supplement.

In *American Law of Zoning* by Anderson, §2.21 he states that the most convincing evidence of loss from confiscatory zoning is dollars-and-cents proof, and in §2.22 he says:

> "A zoning ordinance which deprives a landowner of the entire use value of his property is unconstitutional. Such an ordinance is said to be confiscatory. It effects a taking of property without due process of law, in violation of the Fourteenth Amendment to the Constitution of the United States, and without compensation in violation of provisions found in the constitutions of several states. Such a complete confiscation of an owner's rights in his land offends these constitutional limitations, irrespective of some tendency in the ordinance to serve the public health, safety, morals, or welfare, and notwithstanding its enactment pursuant to a clear delegation of power. Courts which uphold zoning restrictions notwithstanding their severe impact upon land values, provided that a substantial relation to the police power is shown, disapprove ordinances which deny to the affected landowner the whole use value of his property. Thus, a New Jersey court said:
>
> " 'Only where the zoning prohibitions are so restrictive as to allow nothing but economically unfeasible or otherwise inappropriate uses, while forbidding practical utilization of the land, will they be stricken down as confiscatory.' "
>
> * * *
>
> "A zoning ordinance is confiscatory which so limits the use of land that all feasible uses are proscribed."

On this issue, since the Circuit Court dismissed Count I of Snyder's complaint (damages for inverse

condemnation), facts alleged by Snyder in Count I are to be taken as true. Therefore, it may be assumed for the purposes of this cross-appeal as alleged that the zoning ordinance denied Snyder any reasonable use of his land and left him with residential property that was not economically feasible to develop. As a matter of law, these allegations warrant a conclusion that Snyder was deprived of his property (development rights) without just compensation in contravention of the Kentucky and U. S. Constitutions. His property was taken for the public's health, safety and welfare as seen by the OMPC and the Fiscal Court of Daviess County.

The Fiscal Court stated its reasons for denial of the rezoning (T.H. 113 and 114) and saw the denial as within its police power for what it thought was the general welfare. The County Judge insisted time and again in the record that the Fiscal Court was acting in a legislative capacity (T.H. 4, 5, 108, 109 and 110). The arbitrary refusal of the Fiscal Court to rezone in the face of a compelling need to grant the rezoning constituted a legislative act and constituted a commitment of the resources of Daviess County for the general welfare purpose as the Fiscal Court saw it.

Snyder sought administrative relief from the Fiscal Court in its adjudicatory capacity under the authority of *City of Louisville* v. *McDonald,* Ky., 470 S. W. 2d 173 (1971), but the Fiscal Court rejected its adjudicative role and purposefully legislated a taking of plaintiff's property for which an action for inverse condemnation lies.

If this Court rules otherwise, a Kentucky property owner can recover no damages for the wrongful act of the Fiscal Court during the period he is deprived of his development rights. The Fiscal Court will be allowed to act with impunity, and will in no fashion be made to compensate a property owner for the wrong it has done. Even if a property owner ultimately obtains rezoning in the Courts, he has been deprived of his property (development rights) without compensation during the period of delay, and he will suffer great economic loss unless damages are allowed.

Snyder's theory of inverse condemnation has been carried to its logical conclusion by the courts of California. In *Eldridge* v. *City of Palo Alto, Cal.*, 51 Cal. App. 3d 901, App., 124 Cal. Rptr. 547 (1975) a zoning ordinance restricted 750 acres of landowner's property to "foothill" classification as permanent open space and conservation lands, with development limited to construction of one-family dwellings on ten acre lots. The landowner's suit for damages for inverse condemnation was held to state a claim because the act of the zoning authority went beyond the scope of the police power and constituted a taking under state and federal constitutional provisions for which an action for inverse condemnation would lie and for which damages was the remedy.

The California Court made an analysis of the Supreme Court cases, as well as the decisions of other states, to reach its totally consistent conclusion that the remedy provided by the Constitution was the same one

that had been granted in earlier California cases—damages for the taking.

We submit that a Kentucky property owner likewise has a constitutional right to claim recovery in an action for inverse or reverse condemnation when his property has been zoned for no reasonable use and the zoning authority has denied him relief by way of rezoning. Daviess County had the option to rezone Snyder's land or to pay damages in inverse condemnation, and it chose the latter course.

Kentucky has long recognized the existence of a cause of action for inverse condemnation.[8] The rule, as stated in *Commonwealth, et al.* v. *Kelley,* Ky., 236 S. W. 2d 695 (1951), a suit for inverse condemnation arising from flooding caused by a highway ditch, is that an interference with the legally protected use to which land has been dedicated, which destroys that use or places a substantial and additional burden on the landowner to maintain that use, is a taking of his property.

In *Keck* v. *Hafley,* Ky., 237 S. W. 2d 527 (1951) the Court said:

> ". . . the State is not immune from suit if it fails to bring a condemnation proceeding . . ."

Such a suit by a property owner is "condemnation in reverse", and referring to the rights of the landowner,

[8]*Comm. ex rel Dept. for Natural Resources & Environmental Protection* v. *Williams, Jr. J.,* decided by Supreme Court of Kentucky on May 7, 1976 recognizes the existence of just such a theory as we submit exists. Under the Wild River Act the State sought to prohibit a property owner from certain use of his land and the State was ordered by Franklin Circuit Court to proceed to negotiate a settlement with the landowner or condemn the property rights which the State claims under the Act because the landowner was entitled to compensation for the deprivation of his property rights.

the Court held that the landowner has the option to either seek injunctive relief or to recover damages for the taking of his property, though he is not entitled to both remedies.

In *Commonwealth, Department of Highways* v. *Gisborne,* Ky., 391 S. W. 2d 714 (1965) a case of "condemnation in reverse", the Court said:

> ". . . it makes no difference whether property is condemned and appropriated for a public use, or is 'injured or destroyed' for a public purpose, the owner of the property when any of these conditions occur must be justly compensated . . . It does not matter whether the taking or injuring was permanent or temporary. . . ."

Snyder's property rights are guaranteed protection by the Constitution. As between government and the individual, the Court's first concern should be to guard the rights of the individual, not to build up the power of government. The Supreme Court in *U. S.* v. *Causby,* 328 U. S. 256 (1946) long ago recognized that interference with the use of property under the police powers may constitute a taking and support an action for inverse condemnation, and we have precisely that situation in the instant case.

Therefore, we submit that the trial court erred in dismissing Count I of the complaint which set up a claim for inverse condemnation.

III

CONCLUSION

The Supreme Court should reverse the trial court's judgment in so far as it dismissed Count I claiming inverse condemnation and should remand that matter and give Snyder the option to proceed in inverse condemnation or to seek relief by mandamus.

On the second part of Snyder's cross-appeal, the Court should also reverse and hold the Daviess County Interim Zoning Order invalid for failure to comply with the planning prerequisites of KRS Chapter 100.

Respectfully submitted,

RONALD M. SULLIVAN
SANDIDGE, HOLBROOK & CRAIG, P.S.C.
100 St. Ann Building
Owensboro, Kentucky

Attorney for Cross-Appellants